No. 82-1016

In the Supreme Court of the United States

OCTOBER TERM, 1982

SOUTH CENTRAL BELL TELEPHONE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF AUTHORITIES

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1. In this case the Board found (Pet. App. A28-A42) that petitioner South Central Bell Telephone Company violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), when it disciplined five employees holding union office more severely than it did other employees for identical conduct that petitioner deemed a violation of the no-strike clause of the collective bargaining agreement. In reaching this conclusion, the Board applied its rule that, while employers are free to discipline any employee, *including* any employee who holds union office, for violating a no-strike clause, and may also punish acts of actual strike leadership more severely than mere participation, they are barred by Section 8(a)(3) and (1) of the Act from predicating harsher discipline simply on an employee's status as a union officer.

Here, the Board found (Pet. App. A35-A36) (1) that petitioner imposed suspensions on five union stewards that exceeded by five days the suspensions imposed on other employees who engaged in a walkout for the same periods of time, (2) that the stewards had not induced the work stoppage, and (3) that petitioner expressly predicated the longer suspensions on the employees' status as union stewards. The Board rejected petitioner's contention that the additional suspensions were privileged by a provision of the collective bargaining agreement, construed in the light of an arbitral construction of an identical clause in a prior agreement (Pet. App. A36 n.4). Accordingly, the Board concluded that petitioner had unlawfully discriminated against the stewards on the basis of union-related considerations.

2. The court of appeals enforced the Board's order (Pet. App. A1-A27). It rejected what it characterized(*id.* at A14) as the Board's *per se* rule "that disparate discipline can *never* be imposed, even if [employees who are union] officers flout affirmative contractual obligations" (emphasis in original). It nonetheless upheld the Board's conclusion that the extra suspensions at issue violated Section 8(a)(3) and (1) of the Act, because it concluded (Pet. App. A20-A27) (1) that the discipline in question would be unlawfully discriminatory unless the union had contractually waived the union officers' statutory protection against such disparate treatment and (2) that the general no-strike clause on which petitioner relied was not sufficiently "clear and unmistakable" to constitute a surrender of the statutory right. The Court also rejected petitioner's contention that an earlier arbitrator's decision construing an identical no-strike clause as permitting increased discipline of union officers for violating the clause was binding on the Board (*id.* at A6-A9).

DISCUSSION

As petitioner concedes (Pet. 5) the issues decided by the court of appeals in this case "are presently pending before this Court" in *Metropolitan Edison Co.* v. *NLRB*, cert. granted, No. 81-1664 (June 14, 1982) (argued Jan. 11, 1983). Those are the issues presented in Questions 1 and 2 of the petition. As to those questions, the petition should be held and disposed of in light of this Court's decision in *Metropolitan Edison Co.*

The third question presented by the petition (at i) — whether the court of appeals "erred in affirming the [Board's] decision on a ground not relied upon by the Board rather than remanding the case to the Board for further proceedings in light of the rule enunciated by the [court]" —does not merit review by this Court. Even assuming that, under the *Chenery* doctrine, which bars a court from upholding an administrative order on grounds different from those relied on by the administrative agency,[1] the court of appeals erred in failing to remand to the Board the question whether there was a clear and unmistakable waiver of statutory rights, there is little to be gained by granting the petition and directing a remand now, merely to correct such a procedural error. The court of appeals' conclusion that the general no-strike clause, together with the arbitrators' construction of it, did not constitute a clear and unmistakable waiver of statutory rights is entirely consistent with the Board's view of a similar waiver contention in *Metropolitan Edison Co.*, 252 N.L.R.B. 1030, 1035 (1980) — the decision now on review in this Court.[2] See also *Consolidation Coal*

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[1] *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943). Accord, *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 672 n. 6 (1981).

[2] The Board there held that, even assuming the statutory right in question could be waived, the no-strike clause, as construed in light of prior arbitral awards, did not constitute a "clear and unmistakable waiver."

Co., 263 N.L.R.B. No. 188, 111 L.R.R.M. (BNA) 1205 (Sept. 20, 1982). In these circumstances, a remand would serve no useful purpose. See *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n. 6 (1969).

It is therefore respectfully submitted that the petition for a writ of certiorari should be held and disposed of in light of the Court's decision in *Metropolitan Edison Co.* v. *NLRB*, No. 81-1664.[3]

Respectfully submitted.

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JANUARY 1983

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[3]A copy of the Board's brief in *Metropolitan Edison Co.* is being served on petitioner.